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No. 89-623

In the Supreme Court of the United States

OCTOBER TERM, 1989

DOMINGO AVILA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission of the testimony of a psychologist concerning statements made to her by the victim, who testified at trial, was harmless error.

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OPINIONS BELOW

The initial opinion of the Air Force Court of Military Review (Pet. App. 16a-23a) is reported at 24 M.J. 501. The opinion of the Court of Military Appeals reversing the judgment of the court of military review and remanding the case to that court (Pet. App. 6a-15a) is reported at 27 M.J. 62. The opinion of the court of military review on remand (Pet. App. 2a-5a) is unreported. The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a) is not yet officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 1, 1989. The petition for a writ of certiorari was filed on October 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1986).

STATEMENT

Following a general court-martial at McChord Air Force Base in Washington, petitioner, a member of the United States Air Force, was convicted of committing sodomy with his four-year-old step-daughter, Diana Pollock. The court-martial sentenced petitioner to confinement for ten years, a dishonorable discharge, reduction to the lowest enlisted grade, and forfeiture of $319 of his pay and allowances per month for ten years. The convening authority reduced the period of petitioner's confinement (and the corresponding forfeiture of his pay) to seven years, but otherwise approved the findings and sentence. The Court of Military Appeals affirmed petitioner's conviction and sentence.

1. The evidence at trial showed that on December 24, 1985, petitioner sexually molested his step-daughter by twice engaging in sodomy with her. Pet. App. 4a-5a. The question presented in the petition stems from the introduction at trial of the testimony of Dr. Kathleen Mayers, a clinical psychologist, regarding statements Diana made to her during a pretrial examination. *Id.* at 13a-14a.

Dr. Mayers testified that, while being examined, Diana referred to both male and female genitalia as a "boo-boo." Tr. 318. Diana told Dr. Mayers that petitioner had placed his "boo-boo" in her mouth on one occasion and that petitioner had also placed his mouth on her "boo-boo"; that the incident took place around Christmas, while the weather was cold; and that "Daddies" need to learn not to touch girls in their genital area. Tr. 318-319, 329-330.

The government's other evidence consisted of Diana's testimony as well as oral and written statements made by petitioner. Diana, who was four years and seven months of age at the time of trial, testified over a two-day period. Her testimony the first day was limited. Diana was reluctant to answer questions about the offense because she had

been instructed by her mother, petitioner's wife, not to tell anyone what had happened to her. Diana testified that "[s]he said not to tell the Judge anything." Tr. 340. Diana also said that her mother threatened to spank her if she talked about the incident. Tr. 357. Nonetheless, Diana said that petitioner did something to her while her mother was not home that he should not have done. Tr. 349, 354. Diana said that "Daddy sucks me," Tr. 352, which she described as being "[y]uckie," Tr. 355. Diana indicated she referred to genitalia as a "boo-boo." Tr. 354. She indicated the incident had taken place around Christmas, Tr. 358, and that petitioner had drunk beer, which made his breath "smell funny." Tr. 359. When asked to describe what she meant by "daddy sucks me," Diana repeated "I don't want to" and "I can't." Tr. 360-361.

The second day Diana identified "daddy" as petitioner. Tr. 363. After testifying that petitioner did "[b]ad things to me," Tr. 368, Diana again refused to explain what petitioner had done to her, saying her mother told her not to tell anybody. Tr. 370. During cross-examination, Diana said petitioner came home one evening around Christmas after he had been drinking. She said petitioner broke his bed and went into the kitchen and threw things on the floor. Tr. 383-384. On redirect examination, Diana said that her mother was at a bible study meeting when the incident happened. Tr. 392. She said petitioner called her to his bedroom, and "[h]e did bad things to me," which she described as "[h]e sucked me." Tr. 393. Diana was presented with anatomically correct dolls, see PX 4-5, and asked if she could show the court what had happened. Diana refused, saying that her mother told her not to use the dolls to show anyone what had happened. Tr. 395. Diana also reiterated that petitioner had done something to her that she did not like. Tr. 401.

At a hearing held outside the presence of the court-martial panel members, the trial judge explained to Diana that anyone, including her mother, who had told her not to tell the court what had happened to her, was wrong and that Diana should answer the questions. Diana promised that she would do so. Tr. 407-409. When the panel members returned, Diana was given a doll representing a female child, PX 6, another doll representing an older female, which Diana called "Debbie," her mother, PX 5, and a male doll, which Diana referred to as "Domingo," petitioner, PX 4. Tr. 411-412. Diana pointed to the genital area of the "Diana" doll and referred to it as a "boo-boo." Tr. 413. When asked what happened to her there, Diana responded, "Daddy does bad things to me." Tr. 413. Diana said petitioner was naked when this happened. Tr. 414. When asked to use the dolls to demonstrate what had happened, Diana placed the head of the female child doll over the genital area of the male doll. Tr. 415. Diana said petitioner placed his "boo-boo" in her mouth, and she described it as being "yuckie." Tr. 416. She said that this occurred when petitioner called her into his bedroom. Tr. 417. When asked if anything came out of petitioner's "boo-boo," Diana said, "Yes." Tr. 418.

Special Agent Russell Barker of the Air Force Office of Special Investigations, who interviewed petitioner three weeks after the incident, also testified for the government. During that interview, petitioner initially denied that he had sexually assaulted Diana, but he said he drank heavily during December 1985 and that there were periods in which he did not remember what he had done. Petitioner said that if he had sexually assaulted Diana, it was during one of those periods. Tr. 426. Petitioner prepared a handwritten statement for Agent Barker in which he said, "I really do not

know if it is me but if it is I have to know for me and my family." PX 1.[1]

2. On appeal, petitioner argued that the trial judge erred in allowing Dr. Mayer to testify as to Diana's statements to her. The court of military review held that the admission of that testimony was harmless, "find[ing] that the inadmissible evidence had a minimal effect, if any, on resolving [petitioner's] guilt or innocence." Pet. App. 5a.[2] The court explained that Diana was the principal witness against petitioner, that she was present and subjected to cross-examination, and that much of petitioner's own testimony at trial corroborated Diana's account of the incident. *Id.* at 4a-5a.

The Court of Military Appeals summarily affirmed the judgment of the court of military review. Pet. App. 1a.

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[1] In response to an inquiry by the agent, petitioner also described a "game" that petitioner played with Diana called "suck Daddy," in which petitioner would place his tongue inside Diana's mouth when kissing her. Tr. 426.

[2] The military appellate courts issued several opinions in this case before petitioner's conviction was finally upheld. On petitioner's appeal from his conviction, the court of military review vacated the conviction and sentence on the ground that the offense was not service-connected under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). Pet. App. 16a-23a. The Court of Military Appeals reversed that judgment in reliance on *Solorio* v. *United States*, 483 U.S. 435 (1987), which had overruled the decision in *O'Callahan*. Pet. App. 8a-13a. The Court of Military Appeals then went on to address the admission of Dr. Mayers's testimony pursuant to Mil. R. Evid. 803(4). The court held that the testimony was inadmissible under that rule, and remanded the case to the court of military review to determine whether the error was harmless. Pet. App. 13a-15a. On remand, the court of military review, sitting en banc, held that the error was harmless, *id.* at 2a-5a, and the Court of Military Appeals summarily affirmed, *id.* at 1a.

ARGUMENT

Petitioner's sole contention is that the admission of Dr. Mayers's testimony was not harmless error.

Petitioner's principal claim is that the courts below misapplied the harmless error test adopted in *Chapman* v. *California*, 384 U.S. 18 (1967), to determine whether a constitutional error is harmless. Pet. 3-5. The premise of petitioner's argument is that the admission of Dr. Mayers's testimony violated the Confrontation Clause of the Sixth Amendment. Petitioner, however, did not object at trial to the admission of Dr. Mayers's testimony on that ground; petitioner's sole challenge to the admission of Dr. Mayers's testimony was that it did not satisfy the requirements of Mil. R. Evid. 803(4) as a statement made for the purpose of medical diagnosis or treatment. Tr. 131, 237-240. Petitioner has therefore waived any Confrontation Clause claim. In any event, since Diana testified at trial and was cross-examined, the admission of Dr. Mayers's testimony did not violate the Confrontation Clause. *United States* v. *Owens*, 108 S. Ct. 838, 843 (1988) (under the Confrontation Clause, an inquiry into the reliability of an out-of-court statement is unnecessary "when a hearsay declarant is present at trial and subject to unrestricted cross-examination"); *Nelson* v. *O'Neil*, 402 U.S. 622, 626-627 (1971). The courts below therefore properly treated the harmless error inquiry as one that involved only the harmless error statute applicable in the military courts.[3]

The question whether an error is harmless must be determined by reviewing the entire record. *United States* v.

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[3] Article 59(a) of the UCMJ, 10 U.S.C. 859(a), which parallels 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a), provides that "[a] finding or sentence of [a] court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

Hasting, 461 U.S. 499, 509 (1983). The courts below properly carried out that inquiry. Dr. Mayers's testimony (including the testimony given on cross-examination) was relatively brief, Tr. 315-321, 326-330, 333, 478-484, 486, and the portion of her testimony that was held erroneously admitted consisted of approximately two pages of a 270-page trial transcript, Tr. 318-319, 329-330. Moreover, the statements made by Diana that Dr. Mayers related did not describe any event that Diana did not herself relate while on the stand. In addition, petitioner confirmed much of Diana's account of the events leading up to the act of sodomy.[4] Before trial petitioner said on at least two occasions that he was uncertain whether he had committed the act due to his bouts of heavy drinking during December 1985,[5] and petitioner also described an event that occurred during the following month that corroborated Diana's testimony.[6] Under these circumstances, the concurrent

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[4] Petitioner testified at trial that he came home drunk about three nights each week during December 1985 after drinking 10-15 beers. Tr. 435, 464. He said that he was intoxicated on Christmas eve, had an argument with his wife, and started "ripping up the house." Tr. 436. Diana witnessed what was going on and began to cry. Petitioner then went to her room and "tore up her bedroom." Tr. 437.

[5] Petitioner explained the comments in his written statement by saying "I was confused." Tr. 446. On cross-examination, petitioner said he had not passed out on Christmas Eve, but he admitted previously telling an Air Force Social Actions officer that he had "blacked out" or "passed out" on that night. Tr. 467. Petitioner also admitted that before he spoke with Agent Barker on January 15, 1986, petitioner told a Sergeant Swenson that he did not believe he had molested Diana unless he was drunk. Tr. 469.

[6] Petitioner testified that on January 9, 1986, Diana became upset when her mother began to leave for a bible study meeting. Diana asked her mother not to leave "because something terrible is going to happen to me." Tr. 441. Petitioner said that Diana mentioned something about "a sucking thing," but that neither he nor his wife understood what Diana meant by that comment. Tr. 442.

findings of the military appellate courts that the error in this case was harmless do not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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